Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2001

JAMES PRESTON SUTTON
Petitioner
v.
UNITED STATES OF AMERICA
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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May 29, 2001

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QUESTIONS PRESENTED

1. **Is the Federal Criminal "Child Support Recovery Act" 18 U.S.C. § 228 facially unconstitutional and void for violating the "rights, privileges and immunities" provisions of the Fifth and Fourteenth Amendments?**

2. **Is the Federal Criminal "Child Support Recovery Act" 18 U.S.C. § 228 facially unconstitutional and void as exceeding Congress' enactment powers under the Interstate Commerce Clause?**

LIST OF PARTIES

Petitioner **James Preston Sutton,** is a resident and present citizen of the State of Utah and of the United States of America. During the period of the alleged crime, Petitioner remained a domicile of California, commuting to Utah for employment.

The Respondent is the **United States of America**

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Petitioner respectfully prays that a writ of certiorari issue to review the Decision entered by the United States Court of Appeals for the Ninth Circuit on February 28, 2001.

OPINIONS BELOW

The 2/28/01 Memorandum Decision of the Court of Appeals for the Ninth Circuit appears as Appendix A. The final Order of the District Court dated 2/16/00 appears as Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on February 28, 2001. This petition for certiorari is being filed within 90 days of that date. Jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

18 United States Code §228 (See Appendix C)

STATEMENT OF THE CASE

The draconian ***"Federal Child Support Recovery Act,"*** 18 U.S.C. §228 makes a federal crime of a status which is not criminalized under many state laws: owing more than a certain amount of state-established child support arrearage for more than a certain period of time, when the support obliger and the child reside in different states. Support obligers residing in the same state as the supported child are not jeopardized by the federal statute, although the unilateral move of the other parent at any time, with the child, to another state can criminalize the non-relocating obliger. Similarly, if the obliger travels to another state, possibly to earn income in an effort to reduce or pay off an arrearage, federal criminal jeopardy attaches.

Two independent grounds are herein urged for finding 18 U.S.C. §228 facially unconstitutional, void, and thereby divesting any Federal District Court of Subject Matter

Jurisdiction [1] to try, convict or sentence anyone under the statute. Petitioner, having been subjected to such arguably void Subject Matter Jurisdiction, has standing to raise a facial challenge against that exercise. Invalidation on constitutional grounds goes directly to the power of a Federal Court to hear, try, and adjudicate a criminal matter wholly based upon an ***ab initio*** constitutionally void statute. Petitioner lacks the capacity to "forfeit" the question of subject matter jurisdiction. He can, and has, properly raised the issue for the first time on appeal, and could have raised it for the first time in seeking Certiorari.[2]

The first of the two arguments herebelow, applies the recent logic of the Supreme Court in declaring

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[1] The Ninth Circuit erroneously failed to address either of these independent constitutional based challenges to subject matter jurisdiction, stating in tortured reasoning, that "Sutton's attempt to cast his challenge as an attack on subject matter jurisdiction is unpersuasive. Sutton's argument implicates the constitutionality of the underlying statute; it does not implicate the subject matter of the district court." ***Memorandum***, No. 00-10103, CA9, 2/28/01, Appendix A.

[2] "...Must a judgment already rendered be set aside because of an alleged structural error to which the losing party did not properly object? There is no reason in principle why that should always be so. It will sometimes be so - not, however, because the error was structural, but because, whether structural or not, ***it deprived the federal court of its requisite subject-matter jurisdiction. Such an error may be raised by a party, and indeed must be noticed sua sponte by a court, at all points in the litigation, see, e. g., American Fire & Casualty Co. v. Finn***, 341 U.S. 6, 17-18 (1951); ***Mansfield, C. & L. M. R. Co. v. Swan***, 111 U.S. 379, 382 (1884); ***Capron v. Van Noorden***, 2 Cranch 126, 127 (1804). Since such a jurisdictional defect deprives not only the initial court but also the appellate court of its power over the case or controversy, to permit the appellate court to ignore it because of waiver would be to give the waiver legitimating, as opposed to merely remedial, effect, i. e., the effect of approving, ex ante, unlawful action by the appellate court itself." ***Freytag v. Commissioner***, 501 U.S. 868 (1991) JUSTICE SCALIA, with whom JUSTICE O'CONNOR, JUSTICE KENNEDY, and JUSTICE SOUTER join, concurring in part and concurring in the judgment. (emphasis supplied)

unconstitutional a California statutory disparity in welfare amount between newly arrived and long-term California residents as violating the "rights, privileges and immunities" clause of the Fifth and Fourteenth Amendments, and the burdening of a U.S. citizen's right to interstate travel.[3]

The second argument against constitutionality (still a matter of inconsistency between the Federal Circuits) is that criminalization of interstate child support arrearage exceeds the nominal enactment authority of Congress, under the Interstate Commerce Clause.[4]

Sutton, an unemployed, California-domiciled architect, accepted short-term employment on a Utah architectural design project which obliged him to commute between California and Utah. He was indicted on 1/23/98, charged under 18 U.S.C. §228 with one misdemeanor count of willfully failing to pay a total child support arrearage in excess of $5,000 for a California-domicile child for the period in which he was claimed to be residing in Utah.[5]

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[3] ***Saenz v. Rowe,*** 526 U.S. 489 (1999)

[4] The Ninth Circuit's prevailing case approves Congressional power to enact 28 U.S.C. §228, ***U.S. v. Mussari***, 95 F.3d 787 (9th Cir. 1996). During Ninth Circuit briefing of the matter herein sought to be certified, the Sixth Circuit found that Congress lacked Interstate Commerce enactment power, and declared 28 U.S.C. §228 unconstitutional. ***United States v. Faasse***, 2000 WL 1369904 (6th Cir. 2000), No. 98-2337, __F.3d.__. The Sixth Circuit case is not cited as precedent, because it was subsequently accepted for rehearing ***en banc,*** which proceedings have not concluded as of the date of filing hereof. Regardless of ***Faasse's*** ultimate Sixth Circuit outcome, Petitioner believes it to be destined for submission to the Supreme Court.

[5] James Preston Sutton and Debra Sutton Perkins married in 1969, and had three children, born respectively 10/13/72, 12/6/74, 11/24/76. The Suttons resided in El Dorado County, California, separated in 1992, and were divorced there in 1993. Child support was set 12/8/92 at $1500.

Sutton, prior to the divorce, had been a successful architect, but primarily because of the divorce, lapsed into a severe depression and substance abuse problems, and lost his architect's license. Unemployed and unable to pay the former-income-imputed $1500 support, Sutton was in 1994 offered a short-term Utah architectural project which obliged him to commute between California and Utah, and to obtain short-term

Bench trial was held by the Magistrate Judge February 1 through 4, 1999. Oral findings and verdict of guilt were made 2/12/99.On 5/25/99, Sutton was sentenced to five years supervised probation, with a condition that he serve 60 days incarceration and ordered to pay $65,472.02 restitution.

Appeal was noticed from the Magistrate's Judgment to the cognizant District Court Judge on 6/14/99. District Judge Garland Burrell on 2/16/00 affirmed the Magistrate's Judgment. The Ninth Circuit Appeal followed.

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lodgings in Utah. Sutton was unaware of the jeopardy his crossing of state lines caused under 18 U.S.C. §228. He welcomed the possibility of rebuilding his ability to earn income as an architect; however his severe depression ultimately caused his Utah project to collapse.

At the 1999 trial, the federal prosecutor alleged and presented evidence of non-payment of child support arrearage between 3/15/94 and 11/15/94, the date Sutton's youngest daughter turned 21. Defending that such non-payment was not willful, Sutton presented primarily lay witnesses to prove his debilitating depression, and that he had no disposable income beyond his necessary business and living expenses.

The Magistrate Judge, based upon the peculiar overbreadth of the federal statute, claimed to be obliged to find guilt if even a scintilla of payment ability existed, although he found that Sutton never had the ability in any single one of the months in question, to pay $1500.

"I will note that if my interpretation of the statute is incorrect and the law were to be found to be different, that I would render a different verdict in this case, because I find that the government failed to establish proof beyond a reasonable doubt that Mr. Sutton had the ability to pay the entire amount due during any of the period during 1994. In this regard I reject the government's contention that the evidence establishes an ability on Mr. Sutton's part to pay $1500 a month during any part of 1994, because I do not believe the government so established."

".....Based upon all of that evidence the Court does find that during the period of March 1994 through November 1994, the evidence demonstrated beyond a reasonable doubt that during that period of time the defendant had more than a negligible amount of money over and above his necessary business and living expenses from which he could have made payments on his child support obligation but willfully failed to do so. And for that reason the Court finds Mr. Sutton guilty of the charge." (Magistrate's Reporter's Transcript 2/12/99 at pp. 4 and 11-12)

REASONS FOR GRANTING THE WRIT

I.
The Federal Criminal "Child Support Recovery Act" 18 U.S.C. § 228 is facially unconstitutional and void for violating the "rights, privileges and immunities" provisions of the Fifth and Fourteenth Amendments.

Domestic Relations Child support orders on behalf of children residing an a particular state have been, and continue to be, enforceable, collectible, and executable against support obligers in a different state by long arm jurisdiction, by state laws providing for the full-faith-and credit, domestication and honoring of foreign judgments, and by mechanisms provided in all states and territories under The Full Faith and Credit for Child Support Orders Act[6] and Uniform State Laws such as the Uniform Reciprocal Enforcement of Support Act[7], and the Uniform Interstate Family Support Act.[8]

Congressional enactment of the draconian, arguably overbroad, overreaching and assertedly unconstitutional **"Child Support Recovery Act"**, 18 U.S.C. §228 occurred during a period of politically charged congressional fervor regarding child support generally, but in the face of warnings

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[6] Pub. L. No. 103-383, § 3(a), 108 Stat. 4063, 4064 (1994) (28 U.S.C. § 1738B), Each state "shall enforce according to its terms a child support order made consistently with this section by a court of another State."

[7] Uniform Reciprocal Enforcement of Support Act." Family Support Act of 1988, Pub. L. No. 100-485, § 126, 102 Stat. 2343, 2355 (1988) (codified at 42 U.S.C. § 666) URESA includes extradition provisions..

[8] See extensive discussion of these ample state remedies, including recommendations in the 1992 report of the congressionally created U.S. Commission on Interstate Child Support, and legislative histories, cited in ***U.S. v. Kramer***, 225 F.3d 847, No. 99-2262, (7th Cir., 9/5/00)

against excessive use of criminal remedies to solve an essentially civil problem.[9]

No court has thus far addressed an independent, serious constitutional "Right to Travel" challenge of 18 U.S.C. §228[10]. Existence of such a right[11] is deeply ingrained in the United States.[12]

By creating jeopardy of criminal prosecution and incarceration for delinquent state-ordered child support obligers who enter, remain or decide to reside in, a state other than the one in which the support-ordered child resides, Congress in 18 U.S.C. §228 created a powerful burden, chilling the obliger's Fifth and Fourteenth Amendment guaranteed rights, privileges and immunities, particularly the cherished right to interstate travel. The non-child-residency state entered or remained in by the obliger may well contain substantial numbers of similarly situated, but resident, child support obligers whose arrearages are also substantial, but

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[9] "The Commission report also emphasized the importance of state criminal nonsupport statutes and recommended that all states enact them. (citation omitted). It stressed that felony penalties should be "reserved for the especially egregious cases of nonsupport" and that "criminal enforcement is a last resort enforcement device." Id. "Civil enforcement techniques should be tried before prosecuting [a defendant] for criminal nonsupport," the Commission warned. Id. ...When we scrutinize the entire legal landscape surrounding the CSRA, it is clear that this criminal provision is only a small component in a nation-wide effort to deal with the need to enforce support orders." Id., ***U.S. v. Kramer***, 225 F.3d 847, No. 99-2262, (7th Cir., 9/5/00)

[10] The underlying 2/28/01 Ninth Circuit decision evaded the extensively briefed subject matter jurisdiction challenge reasserted herein.

[11] "Congress' Article I powers to legislate are limited not only by the scope of the Framers' affirmative delegation, but also by the principle that the powers may not be exercised in a way that violates other specific provisions of the Constitution. ***See Williams*** v. ***Rhodes*** 393 U.S. 23." ***Saenz v. Rowe,*** 526 U.S. 489 (1999)

[12] ***Saenz v. Roe***, 526 U.S. 489 (1999); ***Atlanta Motel v. United States***, 379 U.S. 241 (1964); ***Aptheker v. Secretary of State***, 378 U.S. 500 (1964); ***Edwards v. California***, 314 U.S. 160 (1941).

who are treated differently by the federal law solely because the child resides in the same state.

Substantial civil and criminal state remedies receive full faith and credit, and, although "less conveniently" still effectively enforce beyond state borders. Draconian constitutional infringement threatened and effectuated by 18 U.S.C. §228 should not be deemed to have a sufficient "rational basis" in "support-collection convenience" to permit discrimination based upon travel and comparative states of residence. Nor may pure economic benefit to the public, alone, justify such discrimination. In affirming a Ninth Circuit decision, The Supreme Court in ***Saenz v. Roe***, 526 U.S. 489, 497 (1999), deemed a potential annual California welfare savings of $10.9 million far less weighty than the infringed Right to Travel of newly arrived indigents.[13] ***Saenz v. Rowe, id.*** has been hailed in scholarly

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[13] "(a)... this Court held in ***Shapiro*** [***Shapiro v. Thompson***, 394 U.S. 618, internal ref. omitted], that a State cannot enact durational residency requirements in order to inhibit the migration of needy persons into the State, and that a classification that has the effect of imposing a penalty on the right to travel violates the Equal Protection Clause absent a compelling governmental interest (b) The right to travel embraces three different components: the right to enter and leave another State; the right to be treated as a welcome visitor while temporarily present in another State; and, for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State. [internal ref. omitted] (c) The right of newly arrived citizens to the same privileges and immunities enjoyed by other citizens of their new State - the third aspect of the right to travel - is at issue here. That right is protected by the new arrival's status as both a state citizen and a United States citizen, and it is plainly identified in the Fourteenth Amendment's Privileges or Immunities Clause, see ***Slaughter-House Cases***, 16 Wall. 36, 80. That newly arrived citizens have both state and federal capacities adds special force to their claim that they have the same rights as others who share their citizenship.[internal ref. omitted]. (d) Since the right to travel embraces a citizen's right to be treated equally in her new State of residence, a discriminatory classification is itself a penalty.

" . . .III The word "travel" is not found in the text of the Constitution. Yet the "constitutional right to travel from one State to another" is firmly embedded in our jurisprudence. ***United States v.***

analysis to amount to a rebirth of "Rights, Privileges and Immunities", long after these guarantees were shrunk and limited in the ***Slaughter House Cases,*** 16 Wall. 36, 80.

Even when Congress deemed the suppression and containment of a threat to national security (as Communism was then regarded when the Subversive Activities Control Act of 1950 was enacted) to be a rational basis for infringement upon the Right to Travel, the Supreme Court voided the passport-denial provision of that Act.[14]

Guest, 383 U.S. 745,757 (1966). Indeed, as Justice Stewart reminded us in ***Shapiro*** **v.** ***Thompson***, 394 U.S. 618 (1969), the right is so important that it is "assertable against private interference as well as governmental action . . . a virtually unconditional personal right, guaranteed by the Constitution to us all." ***Id.,*** at 643 (concurring opinion)

"... The right of "free ingress and regress to and from" neighboring States, which was expressly mentioned in the text of the Articles of Confederation, may simply have been "conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created." [***Shapiro,***] ***Id.***, at 758. The second component of the right to travel is, however, expressly protected by the text of the Constitution. The first sentence of Article IV, 2, provides: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." Thus, by virtue of a person's state citizenship, a citizen of one State who travels in other States, intending to return home at the end of his journey, is entitled to enjoy the "Privileges and Immunities of Citizens in the several States" that he visits. This provision removes "from the citizens of each State the disabilities of alienage in the other States." ***Paul v. Virginia,*** 8 Wall. 168, 180 (1869)

"... What is at issue in this case, then, is this third aspect of the right to travel - the right of the newly arrived citizen to the same privileges and immunities enjoyed by other citizens of the same State. That right is protected not only by the new arrival's status as a state citizen, but also by her status as a citizen of the United States. That additional source of protection is plainly identified in the opening words of the Fourteenth Amendment: 'All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.' "

Id., ***Saenz v. Roe***, 526 U.S. 489 (1999)

[14] " ... there are well-established principles by which to test whether the restrictions here imposed are consistent with the liberty guaranteed in

Jeopardy of federal prosecution and incarceration has a broad, prospective, chilling effect upon citizens' exercise of their Right to Travel, but is not likely to be broadly effective in coercing payment. One need only suffer the travel deprivation, remain in the state where the child resides, and pay nothing. It is not sufficient, in passing constitutional muster, to publicly brag, as do federal prosecutors and child-support collection agencies, that the federal statute has salutary ***in terrorem*** [15] effect.

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the Fifth Amendment. It is a familiar and basic principle, recently reaffirmed in **NAACP v. Alabama**, 377 U.S. 288, 307 "a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." See, **e. g., NAACP v. Button**,371 U.S. 415, 438; ***Louisiana ex rel. Gremillion* v. *NAACP***, 366 U.S. 293, ***Shelton* v. *Tucker***, 364 U.S. 479, 488; ***Schware* v. *Board of Bar Examiners***, 353 U.S. 239; ***Martin* v. *Struthers***, 319 U.S. 141, 146-149; ***Cantwell* v. *Connecticut***, 310 U.S. 296, 304-307; ***Schneider* v. *State***, 308 U.S. 147, 161, 165. In applying this principle the Court in ***NAACP* v. *Alabama, supra***, referred to the criteria enunciated in ***Shelton* v. *Tucker, supra***, at 488: "[E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose." ***Aptheker v. Secretary of State***, 378 U.S. 500, 508 (1964)

[15] "In ***NAACP* v. *Button*** the Court stated that: "[I]n appraising a statute's inhibitory effect upon such rights, this Court has not hesitated to take into account possible applications of the statute in other factual contexts besides that at bar. ***Thornhill* v. *Alabama***, 310 U.S. 88, 97-98; ***Winters* v. *New York***, [333 U.S. 507], 518-520. Cf. ***Staub* v. *City of Baxley***, 355 U.S. 313, 355 . . . The objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchanneled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application. Cf. ***Marcus* v. *Search Warrant***, 367 U.S. 717, 733. These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions." 371 U.S., at 432-433." ***Aptheker v. Secretary of State, id,*** 378 U.S. 500.

II.
The Federal Criminal "Child Support Recovery Act" 18 U.S.C. § 228 facially unconstitutional and void as exceeding Congress' enactment powers under the Interstate Commerce Clause

The Ninth Circuit is among several federal courts of appeal which have rejected the argument that Congress lacked power under the Interstate Commerce Clause to constitutionally enact 18 U.S.C. §228.[16] Although the Supreme Court has denied certiorari of these appellate cases in several instances, it has neither thus far affirmatively examined nor ratified such congressional enactment authority. Given an acceptable factual basis, the Supreme Court has recently voided a different congressional Commerce-Clause-based foray into domestic issues.[17]

18 U.S.C. § 228 (1994), was amended by 18 U.S.C.A. § 228 (2000)[18].The constitutional defects of the 1994 statute and the 2000 amendment remain the same.

The statutory language is overinclusive. It predicates criminal jurisdiction not on flight across state lines, but on simple diversity of residence. It is clear that the statute imposes liability even if it is the child who moved out of state rather than the non-custodial parent. See, e.g., ***United States v. Sage***, 92 F.3d 101 (2d Cir. 1996).

The CSRA does far more than "remove the incentive" to move interstate to avoid payment. The CSRA criminalizes a situation that is not criminal in some states, simply because the defendant moved to another state, even if he moved to

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[16] ***U.S. v. Mussari***, 95 F.3d 787 (9th Cir. 1996)

[17] ***U.S. v. Morrison***, 529 U.S. ___ (5/15/00), voiding a portion of the "Violence Against Women Act".

[18] The Act was amended in 1998, and now includes a provision criminalizing travel in interstate commerce with the intent to evade a support obligation. See 18 U.S.C.A. § 228(a)(2) (2000). Petitioner was convicted under the 1994 version of the Act.

maintain the same, or attain a better, job, or moved to be closer to his family, or to obtain an education. Were the scope of the Act restricted, it presumably would have been enacted pursuant to Congress's legislative authority under the Full Faith and Credit Clause, U.S. Const. art. IV, § 1, cl.2, since the Framers committed interstate enforcement of state court orders to that provision.[19] Instead, the Act deters non-payment of child support by creating a criminal penalty.

Put simply, the CSRA is not about recovery of child support payments avoided by interstate flight. Rather, the Act regulates, through the criminal law, obligations owed by one family member to another, using diversity of residence as a jurisdictional "hook."

In a like vein, the courts have consistently recognized that "[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states, and not the laws of the United States[20].

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[19] ***See 3 Max Farrand***, Records of the Federal Convention of 1787, at 488 (1911) (statement of James Wilson) (if the Legislature were not empowered to declare the effect of state acts, records and judicial proceedings, "the provision would amount to nothing more than what now takes place among all Independent Nations"); **see also *The Federalist*** No. 42, at 287 (James Madison) (Jacob E. Cooke ed., 1961) ("The power of prescribing by general laws the manner in which the public acts, records and judicial proceedings shall be proved, and the effect they shall have in other States may be rendered a very convenient instrument of justice, and be particularly beneficial on the borders of contiguous States, where the effects liable to justice, may be suddenly and secretly translated in any stage of the process, within a foreign jurisdiction.");***Green v. Sarmiento,*** 10 F.Cas.1117,1119 (C.C.D.Pa. 1810) (No. 5,760) ("[T]he power to limit the effect of [state] judicial proceedings, is undoubted; and it was wisely left to the discretion of congress, to regulate the degree of force to be given to such proceedings.").

[20] ***Ex parte Burrus***, 136 U.S. 586, 593-94 (1890); see also ***Sosna v. Iowa***, 419 U.S. 393, 404 (1975) ("regulation of domestic relations . . . has long been regarded as a virtually exclusive province of the States"); cf. ***Ankenbrandt v. Richards***, 504 U.S. 689 (1992) (recognizing a domestic relations exception to the diversity jurisdiction of the federal courts in view of long-held understandings and sound policy considerations).

The CSRA's encroachment on these traditional preserves of state authority does considerable damage to various states' finely wrought schemes for regulating child support. In light of the traditional notions of federalism and in the wake of the watershed case of ***United States v. Lopez***, 514 U.S. 549 (1995), the Commerce Clause should not be construed to countenance such damage.

Even if a forum state has enacted its own criminal non-support statute, the Supreme Court has observed that when "Congress criminalizes conduct already denounced as criminal by the States, it effects a change in the sensitive relation between federal and state criminal jurisdiction."[21]

Ironically, it may be that state power suffers greater disruption when Congress criminalizes conduct that the States have chosen not to criminalize but to regulate in a different fashion, for the federal law assigns to the conduct new costs that differ not just in quantum, but in kind, from the costs defined by the State.

The CSRA disrupts this delicate scheme. By creating a federal criminal penalty/deterrent for disobedience of support orders in some circumstances, the Act renders nugatory the discretion invested in state domestic relations court judges. Moreover, many of these judges are subject to election, and the contours of their discretion are determined by an elected legislature. The CSRA thus prevents state officials from regulating in accordance with the views of the local electorate.[22]). In essence, the Act carves up state law by predicating liability on violations of state preponderance-of-the-evidence court orders, but putting deterrence and penalty decisions into the hands of United States officials in that

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[21] ***United States v. Lopez***, 514 U.S. 549, 563 n. 3, (quoting ***United States v. Enmons***, 410 U.S. 396, 411-12 (1973)).

[22] ***See New York v. United States***, 505 U.S. 144, 168-69 (1992) (noting that where Congress encourages state regulation rather than compelling it, state officials remain accountable to the people, but that accountability is diminished when, due to federal interference, "elected state officials cannot regulate in accordance with the view of the local electorate in matters not pre-empted by federal regulation"

minority of cases in which the state of residence of the payer is different from that of the child.

This federal legislative choice is particularly unsettling given that Congressional power to disturb state regulatory programs has customarily been thought to fall into three categories, into none of which the CSRA comfortably fits. Congress may, pursuant to its spending power, influence a State's regulatory decisions by attaching conditions to the receipt of federal funds.[23] Congress may also craft programs of "cooperative federalism" that offer a State the choice of regulating according to federal standards or having state law pre-empted by federal regulation.[24]. Finally, Congress may, of course, pre-empt outright state laws regulating private activity that otherwise fall within the enumerated powers of the Constitution.[25]

In enacting the CSRA, Congress has followed none of these well-trodden paths. Although the Act does authorize grants to States to coordinate interstate child support enforcement effort[26], these monies are not tethered to the criminal provisions of the legislation.

By piggybacking a criminal sanction on state child support orders, the CSRA recognizes the primacy of the State's laws at the same time that it expressly overrides portions of such laws.

The Constitution diffuses power to protect the citizenry against just such attempts to fragment official action from political accountability.[27]

The Supreme Court struck down the ***Gun Free School Zones Act***, 18 U.S.C. § 922(q)(1)(A), which prohibited "`any individual knowingly to possess a firearm at a place [he]

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[23] ***See South Dakota v. Dole***, 483 U.S. 203, 206 (1987).

[24] ***See Hodel v. Virginia Surface Mining & Reclamation Ass'n***, 452 U.S. 264, 288-89 (1981).

[25] ***See Rice v. Santa Fe Elevator Corp.***, 331 U.S. 218 (1947).

[26] ***See*** 42 U.S.C.A. § 3796cc (West 1994),

[27] ***See The Federalist No. 51***, at 323 (James Madison) (Clinton Rossiter ed., 1969)

knows . . . is a school zone,'" as an unconstitutional exercise of Congress' power under the Commerce Clause. ***United States v. Lopez***, 514 U.S. 549, 551 (1995). That power, the Court observed, only extends to only three types of activity: (1) the use of the channels of interstate commerce; (2) the instrumentalities of interstate commerce, or persons or things in interstate commerce; and (3) those activities having a substantial relation to interstate commerce, namely, those activities that substantially affect interstate commerce. Id. at 558-59. Since § 922(q)(1)(A) did not involve channels or instrumentalities of interstate commerce, the Court reasoned that the statute would be constitutional only if it qualified under the third category, as a statute that regulated an activity which substantially affected interstate commerce. Id. at 559.

"In considering that question, the Court recognized that its case law had not always been clear as to whether an activity must "affect" or "substantially affect" interstate commerce. The Court then explained that "consistent with the great weight of our case law . . . the proper test requires an analysis of whether the regulated activity `substantially affects' interstate commerce." Id. at 559. Having clarified that point, the Court concluded that several critical factors prevented § 922(q)(1)(A) from qualifying as a valid exercise of congressional authority under the third category. First, since § 922(q)(1)(A) did not regulate a commercial activity, the statute could not be upheld as regulating "activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce." Id. at 561. Further, the statute contained no "jurisdictional element which would ensure, through case-by-case inquiry, that the [activity] in question affects interstate commerce." Id. Finally, the statute was not supported by specific "congressional findings [that] would enable [the Court] to evaluate the legislative judgment that the activity in question substantially affected interstate

commerce, even though no such substantial effect was visible to the naked eye." Id. at563.

It has been argued that the CSRA falls within all three Lopez categories. Because payment of child support on behalf of an out-of-state child will normally require the use of channels of interstate commerce, one argument goes, the CSRA is constitutional under the first Lopez category.[28]

Another thesis likens child support obligations to interstate debts or contracts, and asserts that Congress's authority to prevent obstruction of interstate commerce empowers it to criminalize nonpayment.[29]

Yet a third maintains that because the obligations covered by the CSRA, in the aggregate, total billions of dollars, the Act regulates an activity that substantially affects interstate commerce.[30]

Any of these theories would permit the creation of a federal law of ordinary private debt, whenever one party moved out of state after the debt was created. Such arguments should be deemed unpersuasive.

There remains some confusion with respect to the notion that the CSRA regulates the use of the channels of interstate commerce. The term "channel of interstate commerce" refers to, inter alia, "navigable rivers, lakes, and canals of the United States; the interstate railroad track system; the interstate highway system; interstate telephone and telegraph lines; air traffic routes; television and radio broadcast frequencies."[31] Congress has broad authority with respect to these channels; not only may the Legislature regulate them directly, it may act to keep them "free from immoral and injurious uses."[32] But Congress does not act pursuant to this

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[28] ***See, e.g., United States v. Crawford***, 115 F.3d 1397, 1400 (8th Cir. 1997).

[29] ***See, e.g., United States v. Bongiorno,*** 106 F.3d 1027, 1032 (1st Cir. 1997); ***United States v. Sage,*** 92 F.3d 101, 105-06 (2d Cir. 1996).

[30] ***See, e.g., United States v. Parker***, 108 F.3d 28, 30-31 (3d Cir. 1997).

[31] ***Gibbs v. Babbitt***, 214 F.3d 483, 490-91 (4th Cir. 2000) (alteration in original) (internal quotation marks omitted).

[32] ***Caminetti v. United States,*** 242 U.S. 470, 491 (1917).

authority when it regulates an activity that merely "implicates" or "invokes" the use of the channels of interstate commerce.[33] Thus, the Sixth Circuit held in ***United States v. Abdullah*** that the ban on trafficking in contraband cigarettes found at 18 U.S.C. § 2341-46 does not fall within the first Lopez category because the purpose of the ban is not "to keep open the very avenues by which interstate commerce is transacted."[34] Indeed, to hold otherwise would be to collapse the first and second Lopez categories; any regulation of a thing in interstate commerce would necessarily be a regulation of the use of the channels of interstate commerce. Therefore, the Supreme Court should not accept the Congressional subterfuge that claims the CSRA regulates the channels of interstate commerce merely by criminalizing the failure to make support payments which, if made, would normally enter the flow of interstate commerce.

The argument that the CSRA regulates a thing in interstate commerce should be deemed similarly unpersuasive. This contention relies on an analogy between child support obligations and interstate debts, and on the further supposition that Congress may compel payment of debts through its power to prevent obstruction of interstate commerce. Neither half of this contention is compelling. Accepting for the moment the rickety analogy between support obligations and debts, (although, as demonstrated below, support obligations in fact have no commercial character at all) no case is known that holds that Congress has plenary authority to regulate a debt merely because the obligor and obligee reside in different states. Adherents of this theory rely on such pre-***Lopez*** cases as ***Dahnke-Walker Milling Co. v. Bondurant***, 257 U.S. 282 (1921), and ***Allenberg Cotton Co. v. Pittman***, 419 U.S. 20 (1974). In these cases, the parties executed contracts for the sale of goods that were to be performed within the territorial limits of a particular state, but which contemplated that the goods

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[33] ***Cf. United States v. Bailey,*** 115 F.3d 1222, 1227 (5th Cir. 1997).
[34] ***United States v.Abdullah***, 162 F.3d 897, 901 (6th Cir. 1998).

would enter the flow of interstate commerce. When these contracts were breached, the defendants asserted as a defense state laws prescribing conditions on which foreign corporations might do business in the state of contract. The Supreme Court held that these business qualification laws, as applied, violated the Dormant Commerce Clause, saying "we think the transaction was in interstate commerce." ***Dahnke-Walker***, 257 U.S. at 292. Tempting though it may be to apply this snippet in an analysis under Lopez's second category, the Supreme Court itself has acknowledged that the clear import of ***Dahnke-Walker*** and ***Allenberg Cotton*** is that a State has no power "to prevent an engagement in interstate commerce within her limits, except by her leave." ***Sonneborn Bros. v. Cureton***, 262 U.S. 506, 514 (1923). These cases in no way suggest that the federal legislature has regulatory jurisdiction with respect to the conduct of contracting parties on the basis of mere diversity of residency.[35]

Even if they did so suggest, still another obstacle stands in the way of the hypothesis that the CSRA regulates a "thing in interstate commerce." Simply put, defendants in CSRA cases do not put something into the flow of interstate commerce; rather, they refuse to do so. It has been argued that this refusal amounts to an "obstruction" of interstate commerce, which Congress has authority to prevent.[36]

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[35] ***See United States v. South-Eastern Underwriters Ass'n,*** 322 U.S. 533, 545 (1944) (emphasizing that legal formulae devised to assess state power cannot "uncritically be accepted as trustworthy guides to determine Congressional power under the Commerce Clause").

[36] ***See, e.g., United States v. Mussari***, 95 F.3d 787, 790 (9th Cir. 1996).

Congress has power to remove impediments to interstate commerce. Thus, Congress may prohibit racial discrimination that obstructs the flow of interstate commerce[37] But the footnoted line of cases deals with active obstruction of the flow of interstate commerce; it does not stand for the more radical proposition that Congress is empowered to regulate the passive failure of individuals to engage in interstate commerce. [38] More importantly, the obstruction argument conflates the Lopez categories. A prohibition on obstruction of commerce does not regulate "a thing" in commerce, nor does obstruction constitute a "use" of the channels of interstate commerce under the common meaning of "use". Id.

"Rather, Congress has authority to prohibit activities that interfere with commerce because those activities, taken in the aggregate, substantially affect commerce. The CSRA must therefore stand or fall, like the Gun Free School Zones Act, as a regulation under ***Lopez's*** final category.

As discussed earlier, the Gun Free School Zones Act could not be sustained as a regulation of an activity that substantially affects interstate commerce for three reasons. Section 922(q) was a criminal statute that, by its terms, had nothing to do with any sort of economic enterprise; it contained no jurisdictional element that would have ensured, through case by case inquiry, that the activity in question affected interstate commerce; and it was passed without findings elaborating the link between the activity criminalized and interstate commerce. ***Lopez***, 514 U.S at 561-63. The CSRA fails constitutional muster for precisely these same reasons.

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[37] ***See Heart of Atlanta Motel v. United States***, 379 U.S. 241, 253 (1964) (upholding the Civil Rights Act of 1964), prohibit violent actions that interfere with interstate commerce, see ***United States v. Green***, 350 U.S. 415, 420 (1956) (upholding the Hobbs Act), and prohibit restraints of trade that obstruct interstate commerce, see ***Standard Oil Co. v. United States***, 221 U.S. 1, 68 (1911) (upholding the Sherman Act).

[38] ***Bailey***, 115 F.3d at 1239 n. 15 (Smith, J., dissenting).

The activity criminalized by the CSRA is not commercial in nature. The most widely accepted general description of commerce is that given in ***Gibbons v. Ogden***: "Commerce, undoubtedly, is traffic, but it is something more - it is intercourse. It describes the commercial intercourse between nations, and parts of nations in all its branches. . . ." ***Gibbons***, 22 U.S. (9 Wheat.) 1, 189-90 (1824). As Judge Jerry Smith has pointed out, "intercourse" has as its distinguishing feature a notion of reciprocity. ***Bailey***, 115 F.3d at 1236 (Smith, J., dissenting); see also Webster's New World Dictionary of the American Language 733, 734 (2d ed. 1972) (defining intercourse as "communication or dealings between or among people, countries, etc.: interchange of products, services, ideas, feelings, etc.," and interchange as "to give and take mutually; exchange . . . to put (each of two things) in the other's place. . . ."). This element of reciprocity - the mutual exchange of value motivated by economic self-interest - defines the marketplace which fosters social wealth.[39]

The failure to obey a state court order, of course, lacks this essential feature of reciprocity. This is so even where the order mandates a transfer of wealth, as do child support orders.[40] Due to this unilateral, allocative character, support obligations can influence the "national common market" only at the margins, if at all. Indeed, the right to support

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[39] See ***Michael Klausner, Corporations, Corporate Law, and Networks of Contracts***, 81 Va. L. Rev 757, 771 (1995) (noting the basic precept of welfare economics that competitive market forces optimize social wealth). And it is the wealth-creating aspect of markets that justifies a national commerce power in our federal system; as the Supreme Court reminds us, the "overriding requirement" of the Commerce Clause is a national common market. ***Hunt v. Washington State Adver. Comm'n***, 432 U.S. 333, 350 (1977); ***see also Hughes v. Alexandria Scrap Corp.***, 426 U.S. 794, 803 (1976) (noting "the premise, well established by the history of the Commerce Clause, that this nation is a common market").

[40] "[P]ayment of child support is not conditioned on the performance of a reciprocal duty by the obligee, nor does it benefit the obligor." ***Bailey***, 115 F.3d at 1236 (Smith, J., dissenting).

payments is not freely alienable and, in some instances, the payments must be made to the State rather than directly to the ultimate beneficiary, further depriving them of potential to affect the market. As a result, court-ordered wealth transfers to or from state residents are not ***per se*** a fit object of the federal Commerce Power.

Despite the distinctly noncommercial nature of child support orders generally, there might exist a discrete set of failures to satisfy support obligations that "have an explicit connection with or effect on interstate commerce." ***Lopez***, 514 U.S. at 562. Had the CSRA an express jurisdictional element which might limit its reach to those failures, the Act might withstand constitutional scrutiny. Id. It does not. To be sure, the CSRA has a jurisdictional "hook": the obligor parent and beneficiary child must reside in different States. 18 U.S.C. § 228(a). But this requirement will not ensure, through case-by-case inquiry, that a given failure to pay affects interstate commerce. As an initial matter, it would seem that the CSRA will inevitably govern some purely intrastate transactions. To take an extreme example, a child might move to a State different from that of her divorced parents after attaining her majority. If her non-custodial parent were in arrears, he could presumably be prosecuted under the Act, even though the relationship that created the obligation had no interstate character at all, and even though the payments to the former custodial parent, if made, would not cross state lines.[41]

More significantly, by effectively predicating jurisdiction on mere diversity of residency, the Act "regulates every interstate obligation, without exception." ***Bailey***, 115 F.3d at 1238 (Smith, J., dissenting). But, child support obligations are not commercial in character. In the absence of a mechanism that would link particular support obligations to some sort of economic enterprise, sustaining

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[41] ***See Sage***, id., 92 F.3d at 106 (coupling this hypothetical with the questionable observation that the government would not likely invoke the Act where the State could enforce its own order).

the constitutionality of the CSRA on the basis of its current jurisdictional nexus would require paring the "Interstate Commerce Clause" to the "Interstate Clause."

The manner in which the activity regulated by the CSRA substantially affects interstate commerce is therefore opaque. "[T]o the extent that congressional findings would enable us to evaluate the legislative judgment that the failure to satisfy child support obligations substantially affects interstate commerce, they are lacking here." ***Lopez***, 514 U.S. at 563. It is possible to infer from the legislative history that approximately $1.6 billion in interstate child support obligations go unpaid annually, and that Congress believed that some families were driven to federal public assistance as a result of unpaid child support.[42] These observations do not amount to a congressional conclusion that unpaid child support substantially affects interstate commerce.[43]

First, the mere fact that the aggregate social costs of an activity come to a large dollar figure cannot, without more, satisfy the jurisdictional requirement that the activity have a substantial relationship to interstate commerce. See id. at 1754. The notion that the commerce power includes regulation of activities that are connected with a commercial transaction which, viewed in the aggregate, substantially affects interstate commerce stems from ***Wickard v. Filburn***, 317 U.S. 111, 128 (1942), "perhaps the most far reaching example of Commerce Clause authority." ***Lopez***, 514 U.S. at 560. But the Supreme Court has made clear that ***Wickard*** applies to laws that are "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were

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[42] See H.R. Rep. 102-771, at 5 (1992) (observing that $5 billion in support obligations are not met each year, and that approximately one-third of child support cases concern children whose fathers live in a different state).

[43] ***See United States v. Morrison***, 120 S.Ct. 1740, 1752 (2000) (noting that "whether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question").

regulated. Id. at 561. Such is not the case here. The CSRA does not treat a situation involving the "aggregate effect" of potential market participants' refusing to participate in commerce - in no small part because child support orders are not commercial. Moreover, there is considerable doubt that, as a factual matter, court-ordered transfers of wealth from one State to another affect interstate commerce. In the aggregate, any given state should have about as much money from support payments leaving its borders as entering.[44]

Likewise, federal regulatory jurisdiction cannot be founded on the possibility that nonpayment of support orders might cause individual citizens to become dependent on programs funded with federal money. Taken to its logical conclusion, this reasoning would allow Congress to regulate activity of any person that depletes another person's assets and, at bottom, is no different from the "costs of crime" and "national productivity" arguments already rejected by the Supreme Court. ***See Lopez***, 514 U.S. at 563-68. What the Court said in Lopez holds true here as well: "To uphold the[se] contentions . . ., we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." Id. at 567. Accordingly, the CSRA is not a valid regulation of interstate commerce under Lopez's third and final category.

In ***United States v. Morrison***, 120 S.Ct. at 1744, the Supreme Court warned against overly elastic conceptions of the Commerce Clause that would give Congress authority over "family law and other areas of traditional state regulation since the aggregate effect of marriage, divorce, and childrearing on the national economy is undoubtedly significant." Mindful of this admonition, the Supreme Court should hold that the provisions of the Child Support Recovery Act of 1992 contained in 18 U.S.C. § 228 (1994,

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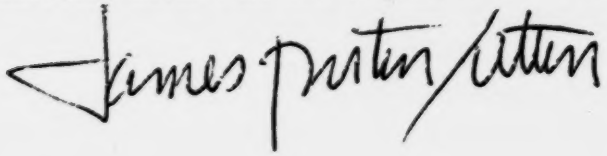
[44] ***See*** Recent Case, 110 Harv. L. Rev. 965, 968 (1997). "Thus, the amount of goods bought in each state relative to other states should be basically unchanged, and interstate commerce left unaffected." Id.

2000) exceed Congress's authority under the Constitution. Such a ruling would not prevent Congress from assisting the States in obtaining interstate enforcement of their courts' orders. Congress can do so (and has done so) pursuant to the Full Faith and Credit Clause. See Full Faith and Credit for Child Support Orders Act, Pub.L. No. 103-383, 108 Stat. 4064 (1994) (codified at § 28 U.S.C. § 1738B (1994)).

But Congress may not, under the guise of the Commerce Power, federally criminalize the failure to obey a state court order regardless of whether the State itself has done so. Such legislation does considerable violence to state regulation by fragmenting the state courts' ability to announce judgments and their ability to determine the sanction that will attend disobedience of those judgments. Absent a stronger connection with the commercial concerns that are central to the Commerce Clause, this intrusion disrupts the federal balance that the Framers envisioned. ***Lopez***, 514 U.S. at 583

CONCLUSION

The Supreme Court should grant Certiorari and thereafter declare 28 U.S.C. §228 to be unconstitutional.



May 29, 2000

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APPENDIX A

FILED
FEB 28 2001
CATHY A CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA No. 00-10103
Plaintiff-Appellee

v. D.C. No. CR-98-00033-GEB

JAMES PRESTON SUTTON
Defendant-Appellant MEMORANDUM*

Appeal From the United States District Court
for the Eastern District of California
Garland E. Burrell, District Judge, Presiding

Submitted February 15, 2001**
San Francisco, California

Before:
ALARCON, KOZINSKI, and HAWKINS, Circuit Judges

Sutton may not claim for the first time on appeal that the Child Support Recovery Act ("CSRA") unconstitutionally burdens his right to travel. ***United States v. Flores-Payon***, 942 F.2d 556,558 (9th Cir. 1991). Sutton's attempt to cast his challenge as an attack on subject matter jurisdiction is unpersuasive. Sutton's argument implicates the

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided in Ninth Circuit Rule 36-3.

** The panel finds this case appropriate for submission without oral argument pursuant to Fed. R. App. P. 34(a)(2)

constitutionality of the underlying statute; it does not implicate the subject matter jurisdiction of the district court.

The magistrate judge did not err in denying Sutton's motion to dismiss because of his challenge to the validity of the underlying child support order. The magistrate judge properly determined that state family court is the proper forum for resolving disputes over child support orders. ***See United States v. Craig***, 181 F.3d 1124, 1128-29 (9th Cir. 1999); ***United States v. Ballek***, 170 F.3d 871, 875 (9th Cir. 1999). Sutton's reliance on ***United States v. Kramer***, 225 F.3d 847, 851 (7th Cir. 2000) is misplaced. Kramer involved the long-standing right to collaterally attack a judgment for lack of personal jurisdiction. Id. At 857. Nothing in this case suggests that the California courts lacked personal jurisdiction over Sutton.

We have previously rejected the argument that the government must establish Sutton's ability to pay the entire amount of his child support obligation. See ***Craig***, 181 F.3d at 1128-29; ***Ballek***, 170 F.3d at 873. A magistrate judge's decision in another circuit, ***United States v. Holbrook***, 15 F.Supp.2d 10 (D.D.C. 1998) does not persuade us to the contrary.

The Judgment of conviction is AFFIRMED.

APPENDIX B

FILED
FEB 16 2000
CLERK, US DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA
Appellee-Plaintiff

v.

No. CR-98-00033-GEB

JAMES PRESTON SUTTON
Appellant-Defendant

ORDER*

Appellant James Preston Sutton was convicted of violating the Child Support Recovery Act ("CSRA") in a bench trial before Magistrate Judge Drozd. Sutton appeals his conviction arguing that the Magistrate Judge erred in denying his motion to dismiss the underlying California State child support order as violative of his due process right under the United States Constitution since he was incompetent when it was issued; that there is insufficient evidence to sustain his conviction for willful failure to pay support since he lacked the ability to pay any single month's child support obligation; that pre-judgment interest should not have been included in the restitution order. For the following r4easons, the Magistrate Judge is affirmed.

Eastern District Local Rules 58-421 and 72-302(b)(3) authorize magistrate judges to exercise jurisdiction over

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* This Order was originally signed on November 30, 1999, and docketed (inexplicably) under seal in Civil S-98-33 on December 2, 1999. Apparently, however, it was not served on the parties. This error was uncovered during a routine house-keeping check by chambers, which failed to locate the Order in the Clerk's file for this action. Since the original Order could not be found, the Order was re-signed on February 16, 2000, and returned to the Clerk's office for filing and service in this action.

misdemeanor cases in this district. Thus, under 18 U.S.C. § 3401(a) the Magistrate Judge had jurisdiction to preside over Sutton's trial after he consented to proceed before the Magistrate Judge. Jurisdiction over this appeal is based on 18 U.S.C. §§ 3231 and 3402 and Fed. R. Crim. P.58(g)(2)(B).

Sutton was convicted of the single misdemeanor charge under the CSRA. The CSRA proscribes that it is unlawful to willfully fail to pay a past due child support obligation. Three months after this CSRA charge was filed in the United States District Court, and five years after the underlying California State child support order was issued by the Eldorado County Superior Court, Sutton filed a motion in that state court challenging the child support order, arguing that the order is invalid since he was mentally incompetent at the time of its entry. He moved to dismiss this federal action on the same ground. The Magistrate Judge denied the motion, finding that the weight of authority did not allow Sutton to challenge in this federal criminal proceeding the merits of the state court order.

Due Process

Sutton argues that the Due Process Clause provides him with the right to an independent review in federal court of the validity of the state court child support order, and that the rulings of the state court denying his mental incompetency defense should be disregarded because those rulings were purely legal, not factually based. However, the Ninth Circuit observed in ***United States v. Ballek***, 170 F.3d 871, 875 (9th Cir. 1999), that "a parent who is subject to an order for child support must seek modification of the order" in state court, rather than simply violating that order. See ***United States v. Craig,*** 181 F.3d 1124, 1128 (9th Cir. 1999) (where the Ninth Circuit indicates that a CSRA prosecution turns only on the defendant's violation of a state court order, not on the fairness of the order.) But Sutton argues that he never had a chance to properly litigate the validity of the child support order either in state or federal court. He contends that he was denied this right in the state superior court because he was

mentally incompetent when the order issued and the state appellate court simply affirmed the superior court's judgment, finding that his action was barred under the doctrine of laches. Sutton argues that the refusal of the federal magistrate judge to consider the legality of those state court rulings resulted in his conviction being based on an underlying state court proceeding in which he was mentally incompetent to participate. The Magistrate Judge was corr4ect in ruling that Sutton could not relitigate in federal court the validity of the state support order. ***United States v. Bailey***, 115 F.3d 1222, 1232 (5th Cir. 1997), cert. Denied ___ U.S. ___, 118 S.Ct. 866 (1998); ***United States v. Williams,*** 1321 F.3d 615, 620 (11th Cir. 1997) cert. Denied ___ U.S. ___, 118 S.Ct. 1398 (1998); ***United States v. Bongiorno***, 106 F.3d 1027 (1st. Cir. 1997); ***United States v. Brand***, 163 F.3d 1268 (11th Cir. 1998).

Further, additional reason exists to affirm the Magistrate Judge's ruling. The state appellate court did evaluate facts when determining whether equitable grounds exiuast4ed to justify Sutton's attempt to vacate or set aside the state child support obligation after the passage of the six month limit for modification of judgments prescribed in California Code of Civil Procedure §473. Regarding this, the Court stated, "laches requires a showing of an unreasonable delay in asserting an equitable right, plus either acquiescence in the act about which plaintiff complains or prejudice to the defendant resulting from the delay." Appellee United States of America's Supplemental Excerpts of Record/Exhibit C, at 11 and 12. The state appellate court first found that the superior court's "findings amount to a determination that husband [Sutton] unreasonably delayed in bringing the motion and a rejection of his excuse for not doing so sooner (continuing mental and emotional incapacity)." Id.

The appellate court then observed that

> [I]n husband's supplemental brief on laches he makes no argument that his delay was not unreasonable. In any event, given the uncontroverted evidence that husband

actively opposed wife's efforts to obtain her rights under the terms of the judgment of dissolution, not only as to support but also as to the recovery of her personal property, during a substantial part of the period in which he claims to have been mentally and emotionally incapacitated, we would reject any such argument. Rather, husband rests his opposition to a finding of laches only on the claim that prejudice to wife from his delay in bringing the motion haws not been shown. We disagree for two reasons.

First, prejudice need not always be shown to make out laches. Rather, laches requires a showing of prejudice or acquiescence in the act about which husband complains. (***Miller v. Eisenhower Medical Center***, supra., 27 Cal.3d at p.624.) Here, the record shows that, following entry of the 1992 support order, husband acquiesced in the validity of the order by participating in an order of examination (based on the order) and by moving to modify the support order.

Second, the record shows prejudice to the wife.

"The failure of a noncustodial spouse promptly to pay child support impoverishes the child by forcing the custodial spouse to defer some expenses, to borrow to pay those expenses which cannot be deferred, or to deplete savings earmarked for future security. Arrearages, when finally collected, do not somehow lose their character as being necessary to support the child's welfare. On the contrary, access to these arrearages may be as critical to the child's welfare as are access to current payments, because arrearages may be the only source available for the family to replenish their depleted resources." (***Hoover-Reynolds v. Superior Court***, (1996) 50 Cal. App. 4th 1273, 1280); fn. Omitted.) This principle applies here even though the

minors have now emancipated. Wife's declaration in opposition to husband's motion is uncontroverted evidence of exactly the type of financial hardship described by the court of ***Hoover-Reynolds***, supra.

By failing to challenge the trial court's determination of his financial obligation until 1998, husband led wife to rely in good faith on her entitlement to receive the support ordered in 1992. "[I]t would circumvent basic fairness to allow [husband] to bring this claim now, after sitting on [his] rights for so long. ***In re Marriage of Plescia***, supra, 59 Cal. App. 4th at p.257; ***see Simon v. Simon*** (1985) 165 Cal. App. 3rd 1044).

We find that laches bars husband's action to vacate the October 8, 1992, Order. Id. At 13 and 14.

Thus, when focusing on whether Sutton made a factual showing evincing the reasonableness of his delay in challenging the support judgment, the state appellate court found that Sutton's factual showing was deficient and "the uncontroverted evidence" showed his active opposition to his wife's efforts to obtain her rights under the terms of the judgment of dissolution..." Id. At 13. Sutton provides insufficient reason to dissuade this federal court from crediting these state trial and appellate courts' factual findings. ***Cf. Lafferty v. Look***, 949 F.2d 1546, 1549 (10th Cir. 1991), cert denied 504 U.S. 911 (1992). Since these factual findings, which are fairly supported by the record, discredit Sutton's mental competency defense, the Magistrate Judge is also affirmed on this ground.

Willful Failure to Pay

Sutton also challenges the sufficiency of the evidence as to his intent to violate the CSRA. The CSRA proscribes the willful failure to pay a support obligation with respect to a child residing in another state. Sutton's intent is reviewed by considering the evidence in the light most favorable to the

government. ***United States v. Randolph,*** 93 F.3d 656, 660 (9th Cir. 1996). The child support order obligated Sutton to pay $1,500 per month. The Magistrate Judge found that Sutton acted willfully because even though he had the means to pay something, he went to the State of Utah without telling his former wife, and there he conducted his financial affairs in a way aimed at concealing his income and assets.

"The CSRA defines a 'past due support obligation' as 'any amount' determined under a state court or administrative child support order that has remained unpaid for more than one year or is greater than $5,000. See 18 U.S.C. §228(d) (emphasis added)); ***United States v. Mattice,*** 186 F.3d 219, 227 (2d Cir. 1999). This language reveals that Congress intended to make partial failures as well as full failures to pay child support obligations actionable under the CSRA.

Since the trial record contains ample evidence to support the Magistrate Judge's finding that while Sutton may have been unable to pay all past due arrears, he was certainly able to contribute to his then-due and owing child support obligations, his conviction is affirmed.

Jury Trial

Further, Sutton challenges the Magistrate Judge's denial of his request for a jury trial. However, Sutton was not entitled to a jury trial because his offense was a petty offense with a six month maximum imprisonment period; and Sutton was sentenced to only 60 days in prison. Although Sutton argues that because he was ordered to pay more than $65,000 in restitution, his penalty was sufficiently severe as to entitle him to a jury trial, he recognizes that the Ninth Circuit rejected the same argument in ***Ballek***. Since ***Ballek*** controls here, Sutton was not entitled to a jury trial.

Restitution

Sutton also challenges the restitution component of his sentence. He argues that 6the Magistrate Judge erred in including approximately $23,000 in interest Sutton owed on his unpaid child support. Sutton contends that the plain language of 18 U.S.C. §228© of the CSRA, which states that "the court shall order r4ewstitution under section 3663 in an amount equal to the past support obligation as it exists at the time of sentencing," does not include any interest on that support obligation. In other words, Sutton suggests that the language Congress used to define a "past due child support obligation" is not as broad as it appears. "The CSRA gave [Sutton] fair warning of its effects should he not pay past due child support obligations after its effective date, and yet he chose not to pay." ***United States v. Crawford,*** 115 F.3d 1397, 1403 (8th Cir. 1997)

Nothing in the CSRA prohibits the inclusion of accrued interest in the restitution order. The interest included in the Magistrate Judge's restitution order was calculated by the El Dorado County District Attorney's Office, which had been added to Sutton's outstanding child support obligation under California child support procedures. Therefore, the Magistrate Judge did not err in including this accrued interest as part of the restitution order.

Conclusion

ACCORDINGLY, THE Court affirms the judgment and rulings of the Magistrate Judge.

IT IS SO ORDERED.

DATED: February 16, 2000 Garland E. Burrell, Jr.
U.S. District Judge

APPENDIX C

18 U.S. Code Sec. 228. Failure to pay legal child support obligations (Current 2000 version; provisions pertaining to Petitioner, including (a)(1) essentially same as 1994 version..)

- (a) Offense. - Any person who -
- (1) willfully fails to pay a support obligation with respect to a child who resides in another State, if such obligation has remained unpaid for a period longer than 1 year, or is greater than $5,000;
- (2) travels in interstate or foreign commerce with the intent to evade a support obligation, if such obligation has remained unpaid for a period longer than 1 year, or is greater than $5,000; or
- (3) willfully fails to pay a support obligation with respect to a child who resides in another State, if such obligation has remained unpaid for a period longer than 2 years, or is greater than $10,000; shall be punished as provided in subsection (c).
- (b) Presumption. - The existence of a support obligation that was in effect for the time period charged in the indictment or information creates a rebuttable presumption that the obliger has the ability to pay the support obligation for that time period.
- (c) Punishment. - The punishment for an offense under this section is -
- (1) in the case of a first offense under subsection (a)(1), a fine under this title, imprisonment for not more than 6 months, or both; and
  (2) in the case of an offense under paragraph (2) or (3) of subsection (a), or a second or subsequent offense under subsection (a)(1), a fine under this title, imprisonment for not more than 2 years, or both.

- (d) Mandatory Restitution. - Upon a conviction under this section, the court shall order restitution under section 3663A in an amount equal to the total unpaid support obligation as it exists at the time of sentencing.
- (e) Venue. - With respect to an offense under this section, an action may be inquired of and prosecuted in a district court of the United States for -
- (1) the district in which the child who is the subject of the support obligation involved resided during a period during which a person described in subsection (a) (referred to in this subsection as an "obliger") failed to meet that support obligation;
- (2) the district in which the obliger resided during a period described in paragraph (1); or
- (3) any other district with jurisdiction otherwise provided for by law.
- (f) Definitions. - As used in this section -
- (1) the term "Indian tribe" has the meaning given that term in section 102 of the Federally Recognized Indian Tribe List Act of 1994 (25 U.S.C. 479a);
- (2) the term "State" includes any State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States; and
  (3) the term "support obligation" means any amount determined under a court order or an order of an administrative process pursuant to the law of a State or of an Indian tribe to be due from a person for the support and maintenance of a child or of a child and the parent with whom the child is living.